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The Precedent: Federal Circuit Confirms that the Absence of Actual Confusion Is Not Dispositive of a Likelihood of Confusion in Sunkist Growers, Inc. v. Intrastate Distributors, Inc.

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In this edition of *The Precedent*, we outline the decision in *Sunkist Growers, Inc. v. Intrastate Distributors, Inc.*

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Overview

The Federal Circuit reversed a decision by the Trademark Trial and Appeal Board (“Board”) dismissing Sunkist Growers, Inc.’s opposition to Intrastate Distributors, Inc.’s applications to register “KIST” and “**kist**” as marks related to soft drinks.

Issue

Whether the Board properly considered and weighed the *DuPont* factors in finding that there was no likelihood of confusion between the marks

Holding

There was a likelihood of confusion even without evidence of actual confusion, because actual confusion is not a dispositive factor.

Background and Reasoning

Intrastate Distributors, Inc. (“IDI”) filed applications to register the marks “KIST” and “**kist**” for soft drinks as well as concentrates and syrups for making soft drinks. Sunkist, which owns multiple “SUNKIST” marks for various beverages and concentrates, opposed those applications. The Board considered the *DuPont* factors to determine if there was a likelihood of confusion and found that all factors favored a likelihood of confusion except for the similarity of the marks and actual confusion. Nevertheless, the Board reasoned that IDI markets its KIST product with references to a kiss, while SUNKIST references the sun, and concluded that the marks were not similar. Further, there was no

evidence of actual confusion. Relying on those two factors, the Board dismissed Sunkist's opposition to the applications.

Sunkist appealed the Board's decision and the Federal Circuit reversed. The Federal Circuit began its analysis by recognizing that likelihood of confusion is a question of law based on findings under the *DuPont* factors, that the Board's factual findings are reviewed for substantial evidence and that the Board's weighing of the *DuPont* factors is reviewed *de novo*. The Federal Circuit then turned to the Board's determination of the "similarity of the marks" factor. The Federal Circuit rejected the Board's analysis that "KIST" relates to a kiss while "SUNKIST" references the sun. The Court reasoned that the Board's error was the result of improperly considering an image of lips next to the "**kist**" mark that were not actually a part of the mark, while simultaneously considering one of Sunkist's design marks that included an image of the sun and ignoring that Sunkist holds marks without a sun. As a result, the Court held that the Board's determination that there was no similarity between the marks was unsupported by substantial evidence.

The only remaining *DuPont* factor that supported the Board's finding was the absence of actual confusion but the Federal Circuit acknowledged that a failure to prove actual confusion is not dispositive. Therefore, with five *DuPont* factors supporting a likelihood of confusion, the Court reversed the Board's decision to dismiss Sunkist's opposition to IDI's applications.